

No. 91-7604

Supreme Court, U.S.

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In The
Supreme Court of the United States
October Term, 1992

JEFFERY ANTOINE,

Petitioner,

vs.

BYERS & ANDERSON, INC., and
SHANNA RUGGENBERG,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF OF RESPONDENT
BYERS & ANDERSON, INC.

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QUESTION PRESENTED

Does a court reporter practicing in federal district court enjoy absolute quasi-judicial immunity from civil liability?

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I. STATEMENT OF THE CASE

A. STATEMENT OF FACTS

Petitioner's statement of facts relies, in large part, upon citations to documents that were not before the trial court when the trial court granted the Respondents' motion for summary judgment. These voluminous materials were the subject of a motion to strike which was granted by the Ninth Circuit. *See* August 27, 1991 Order, Appendix A. Respondent Byers & Anderson, Inc. objects to Petitioner's reliance, in his brief on the merits, upon documents that were not before the trial court when it made its decision on quasi-judicial immunity. Respondents had no opportunity to refute or place the factual allegations in context by supplementing the record with additional materials from the Petitioner's criminal trial docket. Respondent Byers & Anderson, Inc. therefore asks this Court to disregard the documents which were not before the trial court when it granted Respondents' motion for summary judgment based upon quasi-judicial immunity, namely JA 14, 20, 36, 38, 41, 43, 45.

Petitioner's allegation that the United States District Court for the Western District of Washington in Tacoma entered into a contract with Respondent Byers & Anderson, Inc. is an allegation disputed by Respondent Byers & Anderson, Inc. (*see* JA 8-13).

The original record before the trial court did not support Petitioner's allegation that "Ms. Ruggenberg repeatedly failed to provide the transcript, request an extension, communicate with counsel, comply with the

orders, or offer an explanation for her failure." Petitioner's Brief at 2-3.

The original record before the trial court did not support Petitioner's allegation that the "reconstructed transcript remained defective." Petitioner's Brief at 3.

Respondent Byers & Anderson, Inc. refutes Petitioner's conclusion that the Ninth Circuit relied upon the availability of a civil remedy in denying Antoine an acquittal based upon his delay in receiving a complete transcript. Petitioner's Brief at 3. The Ninth Circuit vacated Antoine's conviction and remanded to the district court to determine whether Antoine could show that his right to appeal was specifically prejudiced by his lack of a complete transcript. *United States v. Antoine*, 906 F.2d 1379, 1381, 1383-84 (9th Cir. 1990), *cert. denied*, 111 S.Ct. 398 (1990). On remand, the trial court found that Antoine could show no specific prejudice resulting from the delay in his receipt of a complete transcript (JA 67). This conclusion that Antoine suffered no due process violation as a result of the delay in receiving a transcript was affirmed by the Ninth Circuit (JA 68). This Court denied certiorari at ___ U.S. ___, 113 S. Ct. 273 (October 5, 1992).

B. DECISIONS BELOW

Respondent Byers & Anderson, Inc. agrees with Petitioner's description of the decisions below. In addition, the Ninth Circuit Court of Appeals did not reach three issues that were the subject of a cross-appeal filed by Byers & Anderson, Inc. If this Court reverses the Ninth Circuit's affirmance of Respondent's dismissal based

upon absolute quasi-judicial immunity, then Respondent Byers & Anderson, Inc. asks that this case be remanded to the Ninth Circuit for consideration of its cross-appeals which were held by the Ninth Circuit to be moot (JA 65).

II. SUMMARY OF ARGUMENT

Judicial immunity was designed to protect the judicial process, not the individual court officer. Consequently, absolute immunity attaches only to those functions which are essential to the central purpose of the judicial process, the efficient adjudication of claims.

Utilizing a functional analysis, this Court has held that judges are entitled to absolute immunity only when performing a "judicial function." Similarly, court personnel are entitled to absolute quasi-judicial immunity when performing a judicial function. It is the character of the function performed, rather than the title of the court officer, that determines whether or not judicial immunity attaches.

Court reporters perform a function that is vital to the efficient operation of the judicial process. But court reporters and other judicial offices must routinely interact with disgruntled litigants, many of whom will be dissatisfied with the disposition of their legal dispute. If these dissatisfied litigants were allowed to sue judges, court reporters, and other court personnel, this would interfere with the efficient operation of the judicial process. Court personnel would be distracted and diverted from their public duties, and judgments would be subject to collateral attack.

Forcing court reporters to defend themselves against claims by disgruntled litigants would negatively impact the judicial process and is not necessary. Courts have procedural mechanisms to discourage unreasonable delays, and litigants whose rights are truly prejudiced by an unreasonable delay in receiving a trial transcript may seek redress in the appellate courts.

Absolute immunity should apply to court reporters just as it does to judges, witnesses, jurors and prosecuting attorneys, for all perform functions which are integrally related to the central purpose of the judicial process, the adjudication of claims.

III. ARGUMENT

A. COURT REPORTING IS A JUDICIAL FUNCTION BECAUSE IT IS INTEGRALLY RELATED TO THE JUDICIAL PROCESS

In order for judicial immunity to attach under *Forrester v. White*, 484 U.S. 219 (1988), the actor must be performing a judicial function, and public policy must support immunity. *Forrester v. White*, 484 U.S. at 224. Petitioner and Respondent are in general agreement on the Court's legal standard for the application of absolute quasi-judicial immunity. The parties disagree, however, on how the court should determine whether a court reporter serves a "judicial function." Petitioner defines "judicial function" as a discretionary act, while Respondent Byers & Anderson, Inc. maintains that a "judicial function" is a function integrally related to the adjudicatory process.

1. Petitioner's Discretion Test Is Inapplicable.

Petitioner argues that a court reporter's duties are ministerial rather than discretionary¹, and therefore should not be protected by absolute immunity. Petitioner's Brief at 15-18. An analysis of whether Ruggenberg's court reporting duties were ministerial or discretionary has no bearing upon whether quasi-judicial immunity applies in this case. The appropriate question to analyze is whether Ruggenberg's court reporting duties were integrally related to the judicial process.

In applying a test of discretion, Petitioner confuses judicial immunity with executive immunity. Immunity for government employees outside of the judicial branch of government is an analogue of the doctrine of judicial immunity. Courts cannot draw lines between judicial and administrative conduct when determining whether a government employee in the executive branch is entitled to immunity. Rather, courts ask whether the government employee was exercising discretion, or acting as a decision-maker, in a way analogous to how the judiciary disposes of cases. See *Westfall v. Erwin*, 484 U.S. 292 (1988); *Saul v. Larsen*, 847 F.2d 573 (9th Cir. 1988). This is not, however, the test to be applied to a court reporter.

¹ Neither Petitioner nor Amici Curiae on behalf of Petitioner, have any insight or expertise concerning how much discretion is involved in the performance of a court reporter's duties. For a closer look at the court reporter's function in the courtroom, Respondent refers the Court to the amicus brief submitted by the National Court Reporters Association.

Court reporter immunity is derived from *judicial*, not executive, immunity. Whether judicial immunity attaches to a given act does not depend on whether the act is discretionary, but whether it serves a judicial function. See *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988). This Court in *Forrester v. White*, 484 U.S. 219, did not ask whether the defendant judge's discharge of a court employee was a discretionary act; obviously hiring and firing decisions involve the exercise of discretion. Rather, the court asked whether the conduct was *judicial*, and found that when the judge discharged a probation officer he was performing an administrative rather than judicial function. The question before this Court is not whether Ruggenberg's court reporting duties required the exercise of discretion, but rather whether they served a quasi-judicial function. See *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988).

2. A Quasi-Judicial Function Is One Integrally Related To The Adjudicatory Process.

Petitioner asserts that judicial functions must be characterized by the "exercise of the power to make a binding and conclusive decision, the exercise of power to hear and determine a controversy, the application of objective standards for the determination of an issue, and the declaration or alteration of individual rights and obligations." Petitioner's Brief at 14. Under Petitioner's narrow definition, absolute immunity in the judicial branch would be limited to judges, and judges would be absolutely immune only when making discretionary rulings.

The narrow definition urged by Petitioner ignores the purpose behind judicial and quasi-judicial immunity. Judicial immunity was designed, not to protect individual court officers, but to protect the judicial process. *Burns v. Reed*, 111 S.Ct. 1934, 1943 (1991).² Consequently, all major participants in the adjudicatory process enjoy absolute immunity. Judges enjoy absolute immunity for their actions which relate to the adjudicatory process. See *Forrester v. White*, 484 U.S. at 227; *Stump v. Sparkman*, 435 U.S. 349, 359, *rehearing denied*, 436 U.S. 951 (1978). The prosecuting attorney enjoys absolute immunity for actions taken while prosecuting the case. See *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976); *Johnson v. Reno Police Chief*, 718 F.Supp. 36, 37 (D. Nev. 1989). Trial witnesses enjoy absolute immunity from civil liability.³ See *Briscoe v. LaHue*, 460 U.S. 325, 345-46 (1983). Jurors enjoy absolute immunity from civil liability. See *White v. Hegerhorst*, 418 F.2d 894, 895 (9th Cir. 1969), *cert. denied*, 398 U.S. 912 (1970). Court clerks in many jurisdictions enjoy absolute immunity from civil liability. *Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992); *Mullis v. United States Bankruptcy Court, District of Nevada*, 828 F.2d 1385, 1390 (9th Cir. 1987), *cert. denied*, 486 U.S. 1040 (1988); *Dieu v. Norton*, 411 F.2d 761, 763 (7th Cir. 1969); *Sullivan v. Kelleher*, 405 F.2d 486, 487

² See Part III.B.2.b., *infra*.

³ Surely a fact witness who is sworn to tell the truth should not be exercising discretion when responding to factual questions presented to him or her at trial. Still, witnesses enjoy absolute immunity for they are essential to the functioning of the adjudicatory process.

(1st Cir. 1968); *Zimmerman v. Spears*, 428 F.Supp. 759, 762 (W.D. Tex.), *aff'd*, 565 F.2d 310 (5th Cir. 1977).⁴

Similarly, many courts which have considered the issue have held that court reporters are protected from civil liability by absolute quasi-judicial immunity. See, e.g., *Antoine v. Byers & Anderson, Inc.*, 950 F.2d 1471, 1476 (9th Cir. 1991), *cert. granted*, 113 S.Ct. 320 (1992); *Dellenbach v. Letsinger*, 889 F.2d 755, 763 (7th Cir. 1989), *cert. denied*, 494 U.S. 1085 (1990); *Scruggs v. Moellering*, 870 F.2d 376, 377 (7th Cir.), *cert. denied*, 493 U.S. 956 (1989); *Dieu v. Norton*, 411 F.2d at 763; *Thurston v. Robison*, 603 F.Supp. 336 (D. Nev. 1985).⁵

If Petitioner's narrow definition of a judicial or quasi-judicial function were adopted by the Court, then

⁴ See also *Gregory v. United States Bankruptcy Court for the District of Colorado*, 942 F.2d 1498 (10th Cir. 1991), *cert. denied*, 112 S.Ct. 2276 (1992) (bankruptcy trustee absolutely immune); *Valdez v. City and County of Denver*, 878 F.2d 1285 (10th Cir. 1989) (court personnel who incarcerated spectator found in contempt was entitled to absolute immunity); *Dorman v. Higgins*, 821 F.2d 133, 137 (2d Cir. 1987) (federal probation officers absolutely immune from claim he included false information in pre-sentencing report); *Moses v. Parwatikar*, 813 F.2d 891, 892 (8th Cir.), *cert. denied*, 484 U.S. 832 (1987) (court appointed psychiatrist absolutely immune); *Coverdell v. Department of Social and Health Services, State of Washington*, 834 F.2d 758, 764-65 (9th Cir. 1987) (court appointed CPS worker granted immunity); *Turner v. Barry*, 856 F.2d 1539, 1540 (D.C. Cir. 1988) (probation officer immune from claim of filing false presentence report).

⁵ Those courts that have not applied absolute quasi-judicial immunity to court reporters have erroneously considered whether the court reporter's duties were "discretionary," rather than whether the court reporter performed a function integral to the judicial process. See Part III.A.1., *supra*.

witnesses would not enjoy absolute immunity, court clerks would not enjoy absolute immunity, court reporters would not enjoy absolute immunity, and judges would enjoy absolute immunity only when making a discretionary ruling. See *Foster v. Walsh*, 864 F.2d at 418 (judge's issue of arrest warrant was non-discretionary, but was a "truly judicial act" justifying the application of absolute immunity). Under Petitioner's narrow definition, absolute quasi-judicial immunity would be entirely eliminated, for no quasi-judicial officer makes binding and conclusive decisions that determine a legal issue or individuals' rights and obligations.

The purpose for absolute immunity in the judicial branch is to protect the judicial process. The Ninth Circuit below correctly recognized that the making of the official record of a court proceeding is "inextricably intertwined with the adjudication of claims." *Antoine v. Byers & Anderson, Inc.*, 950 F.2d at 1476.⁶ Similarly, the functions fulfilled by a judge in open court, a trial fact witness, a prosecuting attorney, and a juror, all are inextricably intertwined with the adjudicatory process. All of these actors enjoy absolute immunity when participating in the adjudicatory process.

⁶ Other courts have applied the "integral part of the judicial process" test to determine whether judicial immunity applies. See *Barr v. Matteo*, 360 U.S. 564, 569 (1959); *Boyer v. County of Washington*, 971 F.2d 100, 102 (8th Cir. 1992) (absolute immunity applied to court clerk); *Foster v. Walsh*, 864 F.2d 416, 417 (6th Cir. 1988); *Tripati v. U.S. Immigration & Naturalization Service*, 784 F.2d 345, 348 (10th Cir. 1986), *cert. denied*, 484 U.S. 1028 (1988); *Hughes v. Chesser*, 731 F.2d 1489, 1490 (11th Cir. 1984); *Sullivan v. Kelleher*, 405 F.2d 486, 487 (1st Cir. 1968).

Court reporters are also essential to the adjudicatory process and should continue to enjoy absolute quasi-judicial immunity. See *Dellenbach v. Letsinger*, 889 F.2d at 763; *Scruggs v. Moellering*, 870 F.2d at 377; *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), cert. denied, 495 U.S. 929 (1990); *Mullis v. U.S. Bankruptcy Court For the District of Nevada*, 828 F.2d 1385 (9th Cir. 1987); *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969); *Dieu v. Norton*, 411 F.2d at 763; *Peckham v. Scanlon*, 241 F.2d 761, 763 (7th Cir. 1957).

3. An Historical Basis Exists For The Application Of Absolute Immunity To Court Reporters.

In deciding whether an official performing a particular function is entitled to absolute immunity, this Court has frequently looked for an historical or a common law basis for the immunity in question. *Mitchell v. Forsyth*, 472 U.S. 511, 521 (1985). Petitioner and Amici Curiae incorrectly argue that there is no historical basis for court reporter immunity. Although modern day court reporting did not exist at common law, the preparation and preservation of an official record has always been the responsibility of the court. The preparation of the official record remains a "judicial function" even though judges have delegated their notetaking responsibilities to court reporters. See *Dellenbach v. Letsinger*, 889 F.2d at 761.

Official court reporting began in this country during the 1860's. J. Haviland, "Philander Deming's Role," *The Nat'l Law J.* 15 (Apr. 12, 1982); O. Ratteray, "Verbatim Reporting Comes of Age," *Judicature*, Vol. 56, No. 9, page 368 (Apr. 1973). The idea of attempting to hold a court

reporter personally liable for a delay in receiving a transcript seems to be of recent creation. See *Waterman v. State of New York*, 232 N.Y.S.2d 22, 30 (1962), aff'd in part, rev'd in part, 241 N.Y.S.2d 314 (1963). (To allow these claims to prevail would open a whole new avenue of litigation in an area heretofore non-existent.)

The common law basis for immunity need not mirror current circumstances in order for immunity to apply. An immunity is considered to have a common law basis if an analogous immunity existed at common law. See *Burns v. Reed*, 111 S. Ct. at 1943. At common law, judges were responsible for taking notes during trial which were relied upon in the judicial process.

When the procedure by motion for new trial developed in the eighteenth century the trial judge would supply a report based on his own notes, which might be substantial but incomplete, prepared to help him draft his own judgment, and taken down in longhand in most cases.

H.M. Scharf, "The Court Reporter," 10 *J. Legal History* 191, 197 (Sept. 1989); see also O. Ratteray, "Verbatim Reporting Comes of Age," *Judicature*, Vol. 56, No. 9, page 373 (Apr. 1973).

Judges are still ultimately responsible for preparation of the court record. Supervising the preparation of the record of trial, while a task ordinarily delegated to the court's officers and counsel, is clearly within the general responsibility of the court. *Dellenbach v. Letsinger*, 889 F.2d at 761. The Court Reporter Act requires that court proceedings be recorded verbatim "subject to regulations promulgated by the Judicial Conference and subject to

the discretion and approval of the judge." 28 U.S.C. § 753(b), in pertinent part. Judges now delegate the note-taking portion of their responsibilities to court reporters pursuant to the Court Reporter Act, but if the transcript is unavailable for some reason, judges may still rely upon their own notes in certifying a record to the appellate court. See *Waterman v. State of New York*, 232 N.Y.S.2d at 29.

When deciding whether absolute immunity applies in a given situation, this Court looks not to the title of the actor, but to the function being performed. *Forrester v. White*, 484 U.S. at 224. The modern day court reporter fulfills the same function as the common law judge who took notes to be used as a record for appeal. It is still the "function of the Judge to certify a proper record to the Appellate Court." *Waterman v. State of New York*, 232 N.Y.S.2d at 29. Judges are absolutely immune from civil liability for their preparation of the record for appeal. See *Dellenbach v. Letsinger*, 889 F.2d at 761. The functional approach of this Court does not justify affording court reporters less protection than judges from dissatisfied litigants' vexatious lawsuits. The court reporter has been delegated a function previously performed by judges under the protection of absolute judicial immunity. This provides the historical basis for applying absolute quasi-judicial immunity to court reporters.

B. PUBLIC POLICY FAVORS CONTINUED APPLICATION OF ABSOLUTE IMMUNITY TO COURT REPORTERS.

1. Court Reporter Immunity Supports The Finality Of Judgments.

The original purpose for the doctrine of judicial immunity was to discourage collateral attacks on court judgments, and thereby establish appellate procedures as the standard system for correcting judicial error. *Forrester v. White*, 484 U.S. at 225; J. Block, "Stump v. Sparkman and the History of Judicial Immunity," 1980 Duke L. Journal 879. Petitioner Antoine is attempting such a collateral attack in this case.

Petitioner asserts that the "only remedy" for his "now long-completed constitutional violation" is an action for damages. Petitioner's Brief at 8. In this civil case, Antoine seeks \$2,000,000 and additional relief for his delay in receiving a transcript of his criminal trial which allegedly denied him of his constitutional right to due process (JA 4). The United States Constitution does not guarantee the right to a verbatim transcript of a criminal trial proceeding. Moreover, the Ninth Circuit Court of Appeals has already ruled that the delay in producing the transcript of Antoine's criminal trial did not deny Antoine of his constitutional right to due process (JA 68).

Antoine availed himself of the appropriate avenue for seeking redress for his delay in receiving the trial transcript. Antoine raised the unavailability of a completed transcript as an issue on appeal when he appealed his criminal conviction. See *United States v. Antoine*, 906

F.2d at 1381. The Ninth Circuit upheld the trial court's finding that the delay in the production of a completed transcript did not prejudice Antoine in his right to appeal and therefore did not violate his constitutional right to due process (JA 66).

Antoine should not be allowed to collaterally attack the Ninth Circuit's holding that his constitutional rights have not been violated, in the context of this civil action against the court reporter who recorded his criminal trial.

Most judicial mistakes or wrongs are open to correction through ordinary mechanisms of appellate review, which are largely free of the harmful side-effects associated with exposing judges to personal liability. *Forrester v. White*, 484 U.S. at 227. Similarly, the appellate process allows litigants the opportunity to challenge the actions of other participants in the adjudicatory process.

. . . the judicial process is largely self-correcting; procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

Mitchell v. Forsyth, 472 U.S. at 522-23.

If the probation officer had not been allowed to sue the judge for wrongful discharge in *Forrester*, she would have had no other remedy. She was not damaged in the adjudicatory process, so she would have no right to appeal. Contrarily, litigants who are wronged in the adjudicatory process have the right to seek redress on appeal. This, coupled with the possibility of a high volume of vexatious lawsuits brought by disgruntled litigants, justifies continuing the application of absolute quasi-judicial immunity to court reporters.

The application of absolute quasi-judicial immunity to the court reporter and the court reporting firm in the case below did not infringe upon Antoine's constitutional rights. This has already been decided by the Ninth Circuit, and this Court did not grant certiorari on this issue (JA 66). If this case were remanded to the trial court, this Respondent would assert the defense of *res judicata*. Upholding absolute immunity for court reporters supports the finality of judgments.

2. Exposing Court Reporters To Civil Liability Would Negatively Impact The Judicial Process.

During recent years, budgeting constraints have sometimes forced trial courts to handle increased volumes of cases with an inadequate number of court reporters. See M. Fox, "Eastern District's Hours Cut Due to Federal Budgeting Law," Vol. 200, New York L. Journal, page 1, col. 1 (Nov. 2, 1988); R. Hanley, "U.S. Court Delayed by Reporter Shortage," Vol. 100, The Los Angeles Daily Journal, page B1, col. 1 (July 16, 1987); C. McHugh, "No Funds for State-Paid Court Reporters: Gully," Vol. 130, Chicago Daily Law Bulletin, page 1, col. 5 (April 13, 1984). The published appellate decisions in which a litigant has sued a court reporter for the reporter's delay in producing a completed transcript usually involve a court reporter with a large backlog of transcription orders. See, e.g., *Holt v. Dunn*, 741 F.2d 169 (8th Cir. 1984); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981). Forcing court reporters to bear the brunt of this systemic problem by exposing them to

personal liability would negatively impact the judicial process.

a. The Threat Of Litigation Could Be Used To Unduly Influence The Judicial Process.

One reason absolute immunity is extended to the judiciary is to eliminate any possibility that the threat of litigation may influence the judicial process. See *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 347 (1871). In fulfilling its function of dispensing justice, the judicial branch is expected to follow fair procedures that apply to all litigants. The elimination of absolute immunity could cause court reporters to provide preferential service to litigants who threaten litigation.

Petitioner's argument that court reporters exercise no discretion because they are required by statute to promptly transcribe a record of a proceeding upon the request of a party or a judge, is myopic and ignores the reality of transcript backlog. Faced with a significant backlog of ordered transcripts, the threat of civil litigation could cause a court reporter to produce a transcript for a disgruntled litigant who threatens the court reporter with a civil lawsuit before preparing transcripts ordered earlier by other litigants.

b. The Elimination Of Absolute Immunity For Court Reporters Would Interfere With The Functioning Of The Courts.

"Absolute immunity is designed to free the *judicial process* from the harassment and intimidation associated

with litigation." *Burns v. Reed*, 111 S. Ct. at 1943 (emphasis in original); see *Forrester v. White*, 484 U.S. at 226; *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). The judicial process is an arena of open conflict, and it is inevitable that many of those who lose in trial will blame those associated with the court process. *Mitchell v. Forsyth*, 472 U.S. at 509-10; *Butz v. Economou*, 438 U.S. 478, 512 (1978). Judges are insulated from such vexatious litigation by absolute judicial immunity. *Forrester v. White*, 484 U.S. at 226. Similarly, other participants in the adjudicatory process have been clothed with absolute quasi-judicial immunity. See Part III.A.2., *supra*. Otherwise, judicial immunity would be an empty protection allowing harassments directed at the judge to proceed against other courtroom participants. See *Kincaid v. Vail*, 969 F.2d at 601; *Dellenbach v. Letsinger*, 889 F.2d at 763; *Scruggs v. Moellering*, 870 F.2d at 377; *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1, 3 (1st Cir. 1976); *Lockhart v. Hoenstine*, 411 F.2d 455, 460 (3d Cir. 1969).

Despite these concerns expressed by the First, Third and Seventh circuits, the Petitioner maintains that there is no reason to believe that the elimination of absolute immunity for court reporters will result in unwarranted litigation. Petitioner's Brief at 22-23. In support of this argument, Petitioner engages in a statistical analysis based upon highly questionable methodology. See Petitioner's Brief at 23.

Petitioner concludes that the elimination of absolute immunity for court reporters will not result in an increase in litigation because relatively few appellate decisions have been published on court reporter immunity in the

Eighth and Second circuits since these two courts limited court reporter immunity. The number of published appellate decisions on court reporter immunity, however, bears no direct relationship to the number of lawsuits filed against court reporters in these two circuits. The Petitioner further ignores the logical consequence of this Court adopting his narrow definition of "judicial function" for the purpose of applying immunity; namely, the elimination of absolute immunity for all quasi-judicial officers. See Part III.B.4., *infra*.

If court reporter immunity is eliminated or limited, then court reporters will be required to defend themselves in civil lawsuits filed by disgruntled litigants. This would divert them from their duties. This policy reason supports the continuation of absolute immunity for court reporters. See *Imbler v. Pachtman*, 424 U.S. at 425 (prosecutor entitled to absolute immunity because responding to private litigation would divert energy and attention from enforcing the criminal law).

Obviously, the individual court reporter who is forced to defend against a negligence claim would be diverted from the reporter's responsibility to transcribe court proceedings, thus further contributing to the backlog of ordered transcripts. But the impact of exposing court reporters to civil liability would not be limited to the individual court reporter. Defending such a claim would require discovery directed at uncovering the reason for the backlog of ordered transcripts, and the normal turnaround time for transcripts prepared by other court reporters in similar positions. The percentage of a particular judge's decisions that are appealed would become a relevant subject of discovery. It is foreseeable that in

defending a court reporter against a civil claim for damages allegedly resulting from the delay in receiving a completed transcript, that depositions would be taken of the individual court reporter, other court reporters in similar situations, the clerk of the court, and the judge who supervised the individual court reporter. Each of these parties could also be called to testify at the time of trial. Obviously, the impact on the judicial process if this were to occur would be negative and potentially great if such lawsuits became accepted. A reversal of the Ninth Circuit in the instant case would set a new national precedent which would invite the filing of such lawsuits throughout the country.

3. Exposing Court Reporting Firms To Civil Liability When They Are Assisting The Court In An Emergency Is Against Public Policy.

Amici curiae Scott argues that even if absolute immunity applies to court reporter Ruggenberg, a different standard should apply to Byers & Anderson, Inc. Amici brief at 20-34. This issue is not before the Court and the Scotts' civil state court action is not before the Court.⁷ Nevertheless, public policy does not favor imposing liability on a private court reporting firm supplying a trial court with a court reporter in an emergency.

⁷ The Scotts' amici curiae brief should be stricken because it is not written on the record before the Court and because it addresses an issue that was not raised by Petitioner in his petition for certiorari. See Respondent's Objection to Motions for Leave to File Briefs of Amici Curiae at 1-3.

Federal courts are statutorily authorized to hire temporary court reporters on an emergency basis. See 28 U.S.C. § 753(g). These court reporters are essentially temporary employees of the federal district court. They perform the same functions as the court's regular reporters, only on a short term basis. Exposing a court reporting firm to liability for supplying a federal court with a reporter on an emergency basis would be unfair and against public policy.

If court reporting firms were required to defend against litigation stemming from temporary court reporters' delays in producing transcripts, the associated discovery and trial processes would disrupt the judicial process in the same way that requiring individual court reporters to respond to civil litigation would. See Part III.B.2., *supra*. An additional inequity would result under amici curiae's scenario, however. The court reporting firm that supplies a court reporter to a court on an emergency basis could potentially be found civilly liable for the actions of an individual court reporter even though the court reporting firm had no control over the behavior of the individual court reporter while he or she was working for the federal court.⁸ Additionally, although the court reporting firm could potentially be found liable, it would have no right of indemnity against

⁸ The principals of Byers & Anderson, Inc. did not know that Ruggenberg had been assigned to report the Antoine trial, and they certainly had no control over the performance of Ruggenberg's duties while she was temporarily employed by the federal district court (JA 8-10 and 12-13). This "control" issue is relevant to Respondent's cross-appeal which was held to be moot by the Ninth Circuit.

the individual court reporter or the court because both would be immune. The prospect of this serious inequity could make private court reporting firms reluctant to voluntarily supply a court reporter to a federal district court in an emergency situation, which would also negatively impact the judicial process.

In *Stump v. Sparkman*, 435 U.S. 349, rehearing denied, 436 U.S. 951 (1978), this Court held that the application of judicial immunity depends, in part, upon the expectations of the parties. The litigants who come before a federal trial court have no different expectation of a court reporter who is a permanent employee of the court, than they do of a court reporter who is a temporary employee of the court provided by a private court reporting firm. To hold that a litigant has a cause of action in one circumstance and not the other would be to promote form over substance contrary to the functional approach set forth in *Forrester v. White*, 484 U.S. at 224.

4. Limiting Court Reporter Immunity Would Be Unfair And Would Logically Lead To The Erosion Of Other Immunities.

Petitioner argues that the scope of this case is very narrow. Petitioner's Brief at 7. The position urged by Petitioner, however, would essentially eliminate absolute quasi-judicial immunity or, if limited to the facts of this case, would result in an unfair and inconsistent application of the immunity doctrine to court reporters contrary to this Court's functional approach.

If this Court adopts Petitioner's discretionary versus ministerial test for the application of judicial or quasi-

judicial immunity, this would expose not only court reporters, but all court personnel to potential expanded liability. The Fifth Circuit which has adopted Petitioner's discretionary versus ministerial test has denied absolute immunity to court clerks as well as court reporters. See *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980).

Adoption of Petitioner's definition of a judicial act would effectively eliminate absolute immunity for all quasi-judicial officers. No quasi-judicial officer possesses the authority to make ultimate discretionary decisions on issues before the court and consequently, no quasi-judicial officer would qualify for absolute immunity under Petitioner's narrow definition. See Petitioner's Brief at 14.

It is even unclear what impact adoption of the Petitioner's urged position might have on the absolute immunity of judges. For example, would a judge become potentially liable for issuing an arrest warrant? See *Foster v. Walsh*, 864 F.2d at 418 (judge's issuance of arrest warrant was *non-discretionary*, but was a "truly judicial act" justifying the application of absolute immunity). Could a judge be liable for the entry of a stipulated order? Would a judge be immune from liability for hiring an insufficient number of court reporters, while at the same time the individual court reporters could be held liable for their inability to promptly produce transcripts due to this insufficient hiring? See *Rheuark v. Shaw*, 628 F.2d at 304. In *Rheuark*, the fifth Circuit held that a judge was absolutely immune from civil liability for his alleged failure to appoint a sufficient number of court reporters to alleviate the backlog of transcripts ordered in his court, yet the court reporter was granted only qualified immunity. 628 F.2d at 304. This result is consistent with the discretionary

versus ministerial test urged by Petitioner but could lead to the inequitable result of a court's insulation from liability for inadequate hiring, while the court's employee could be held personally liable for the logical result of this inadequate hiring. This result would not only be inequitable, it is contrary to this Court's opinion in *Forrester v. White*, *supra*, which suggests that hiring and firing decisions are administrative rather than judicial acts and consequently are not protected by absolute judicial immunity.

5. Other Checks Exist To Prevent Court Reporter Abuses

Necessarily, immunity may protect some individuals who act with improper motives. See, e.g., *New Alaska Development Corp. v. Guetschow*, 869 F.2d 1298, 1301-02 (9th Cir. 1989) (malice or corrupt motive in the performance of judicial tasks is insufficient to deprive a judge of absolute immunity). This does not mean that the judicial system is powerless to address such abuses. Petitioner incorrectly asserts that no "checks" exist to prevent court reporter abuses. Petitioner's Brief at 21-22. The courts have numerous mechanisms to control court reporter behavior.

A court reporter works under the direct supervision of the court. See 28 U.S.C. § 753(c). If a court reporter unreasonably delays the production of a transcript, a judge may impose sanctions on the court reporter (which occurred in this case) or remove the court reporter from his or her position. See T. Sullivan, "Court Reporter Fined

for Late Transcripts," Vol. 135, Chicago Daily Law Bulletin, page 1, col. 2 (Nov. 8, 1989); K.F. Millhouse, "Court Reporters Required to Diligently Comply With Deadlines for Transcript Preparation: *In Re Watson*," Vol 13, Pepperdine L. Rev. 543-44 (Jan. 1986); see also, M. Tapp, "Delays Charged In Bankruptcy Appeals," vol. 131, Chicago Daily Law Bulletin, page 1, col. 5 (July 12, 1985). A judge can find a court reporter in contempt of court or mandate a reduced fee schedule for transcripts that are produced late.

Most officials who are entitled to absolute immunity from civil liability are subject to other checks that help prevent abuses of authority from going unredressed. *Mitchell v. Forsyth*, 472 U.S. at 522. The existence of such safeguards against improper performance is a characteristic of tasks which are "integrally related to the judicial process." *Dorman v. Higgins*, 821 F.2d 133, 136 (2d Cir. 1987). The numerous mechanisms available to the court to control a court reporter's unreasonable delay in producing a transcript, coupled with a litigant's ability to seek redress through the appellate process, favors the retention of absolute immunity for court reporters.

C. QUALIFIED IMMUNITY WOULD NOT ADEQUATELY PROTECT THE JUDICIAL PROCESS.

Petitioner's argument that qualified immunity adequately protects the interests of court reporters misconstrues the purpose of judicial immunity. See Petitioner's Brief at 31-34. Judicial immunity was not designed to protect individual court officials. Judicial and

quasi-judicial immunities were designed to protect the judicial process. *Burns v. Reed*, 111 S.Ct. at 1943. Petitioner's argument that qualified immunity will protect all but the incompetent or malicious ignores the impact that forcing court reporters to respond to civil litigation will likely have on the judicial process.

The opinions of this Court recognize the important procedural difference between the application of absolute and qualified immunity.

An absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity. The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial. . . .

"It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."

Imbler v. Pachtman, 424 U.S. at 419, n. 13 and 14, quoting *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). At least one court that has limited court reporter immunity has held that the dismissal of an action on the basis of immunity is proper only when an official is absolutely immune, and not when the official is qualifiedly immune. *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980).

This Court has never limited the immunity of a judicial official who was performing a function integrally

related to the adjudicatory process. The purposes of judicial immunity – to promote finality of judgment, to protect the judicial process from the burden of vexatious lawsuits, to prevent undue influence on the judicial process – cannot be fulfilled by the application of qualified immunity. The negative impact that litigation would have on the court process would not depend upon the outcome of the lawsuits. The harm is created by the potential exposure to liability, which would require court personnel to become embroiled in litigation.

It is anticipated that Petitioner will argue that the protection of qualified immunity is stronger since this Court's decision in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). In *Harlow*, presidential aides appealed the lower court's decision that they were not entitled to absolute immunity. In response to concern about the subjective nature of the "good faith" test for the application of qualified immunity, this Court held in *Harlow* that a court may determine by summary judgment that the law at the time the action occurred was not clearly established and consequently dismiss the case. See *Harlow v. Fitzgerald*, 457 U.S. at 818.

Harlow v. Fitzgerald, *supra*, has no application to this case. *Harlow* involved executive, not judicial, immunity. Consistent with long-standing precedent, the opinion in *Harlow* reiterated that judicial functions "require absolute immunity." 457 U.S. at 811 (emphasis added).

Even if this court were to attempt to apply the semi-objective test set forth in *Harlow* to court reporters, this would not adequately protect the judicial process. The statutes and procedural rules governing the production

of trial transcripts are not unclear. For example, the Ninth Circuit local rules require a court reporter to "begin preparation of the transcript as soon as a Transcript Order Form is filed in the district court and is received by the court reporter." Ninth Circuit R. App. P. 10-3.2(e). If the law is clearly established, then the qualified immunity defense fails under *Harlow*. 457 U.S. at 818. The problem faced in the case below, and most other cases involving trial transcript delay, does not stem from the court reporter's ignorance of the statutes and procedural rules. The problem is the overburdened system which makes strict adherence to the time requirements set forth in the statutes and procedural rules, at times, impossible. Even the Fifth Circuit, which affords court reporters only qualified immunity, has recognized that it "cannot charge the court reporter with responsibility for the harm suffered by appellee since he could do the work of only one person." *Rheuark v. Shaw*, 628 F.2d at 305, n.13.

IV. CONCLUSION

Court reporters perform a "judicial function" in federal court and are entitled to the same absolute immunity afforded other participants in the adjudicatory process. The Ninth Circuit should be affirmed.

DATED this 30th day of December, 1992.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JEFFREY ANTOINE,

Plaintiff/Appellant,

vs.

BYERS & ANDERSON, INC.,

SHANNA RUGGENBERG,

Defendants/Appellees.

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NO. 90-35293

90-35362/63

DC# CV-88-260-RJB

ORDER

In response to appellee's motion to strike portions of appellant's brief and exhibits, the parties should be advised that the court will consider the record as it was before the court when it ruled on the motion for summary judgment (no more or no less).

FOR THE COURT,

CATHY A. CATTERSON

CLERK OF COURT

Gwendolyn Baptiste

Deputy Clerk